UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

MICHAEL BACA, POLLY BACA, and ROBERT NEMANICH, Appellants v. COLORADO DEPARTMENT OF STATE Appellees.	Case No. 18-1173 On appeal from the United States District Court for the District of Colorado, Senior Judge Wiley Y. Daniel, Case No. 1:17-cv-01937-WYD-NYW

BRIEF OF AMICUS CURIAE COLORADO REPUBLICAN COMMITTEE

Amicus Curiae Colorado Republican Committee submits this Brief in support of Appellee Colorado Department of State and affirmance of the decision below.

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STATEMENT OF IDENTITY OF AMICUS CURIE, INTEREST IN CASE AND AUTHORITY TO FILE BRIEF

Amicus Curiae Colorado Republican Committee ("CRC") through counsel, Brownstein Hyatt Farber Schreck, LLP, and in compliance with Federal Rule of Appellate Procedure 29(c), states as follows:

CRC is an unincorporated non-profit association and a major political party in Colorado under Section 1-1-104(22), C.R.S. The CRC will be directly affected by the outcome of this case as its ability to select presidential electors in the manner contemplated by Colorado state statute and its own bylaws may be impaired. The CRC submits this brief with the consent of all parties to the case pursuant to Federal Rule of Appellate Procedure 29(a).

No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief and no person other than the CRC contributed money that was intended to fund preparing or submitting this brief.

s/Christopher O. Murray
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SUMMARY OF THE ARGUMENT

Appellant's claim that Article II and the Twelfth Amendment forbids Colorado from requiring presidential electors to honor the outcome of the state's popular vote when casting their ballots in the Electoral College is foreclosed by the Supreme Court's decision in *Ray v. Blair*, 343 U.S. 214 (1952), which dealt with an Alabama law that delegated to political parties the authority to nominate electors. The Alabama Democratic Party required that prospective electors pledge to support the Democratic candidates for President and Vice-President. The Supreme Court held that there was no federal constitutional prohibition against a State's authorization of a political party to choose its nominees and to fix qualifications—including loyalty to the party ticket—for candidates. Colorado law also delegates the nomination of electors to political parties. As a major political party under Colorado Law the Colorado Republican Committee ("CRC") nominates slates of presidential electors by means of a committee authorized by resolution of its state convention pursuant to C.R.S. §§ 1-4-302(1) and 1-4-701(1). This Court should apply *Blair* to affirm the District Court and in so doing align itself with Supreme Court precedent holding that the States' power to appoint presidential electors is broad, and the longstanding practice of the States and Congress in the administration of presidential elections.

ARGUMENT

I. *Ray v. Blair* establishes that States—and political parties—may bind electors.

Ray v. Blair controls this case. *Blair*, to be sure, involved the *making* rather than the *enforcement* of a pledge. A federal court, however, is "bound by the theory or reasoning underlying a Supreme Court case, not just by its holding." *Witt v. Dept. of Air Force*, 527 F.3d 806, 818 (9th Cir. 2008). The reasoning of *Blair* confirms that States may require electors not only to make pledges but also to honor them. *Blair* rejected "the argument that the Twelfth Amendment demands absolute freedom for the elector to vote his own choice." 343 U.S. at 228. This Court should reject the same argument here. *Blair* reasoned that nothing in "the language" of the Twelfth Amendment prohibits requiring electors to make pledges. *Id.* at 225. By the same token, nothing in the Amendment's language prohibits requiring electors to fulfill those pledges. *Blair* emphasized the "longstanding practice" of appointing electors "simply to register the will of the [people] in respect of a particular candidate." *Id.* at 228–29 & n.16. The Court added that States generally "do not [even] print the names of the candidates for electors on the general election ballot," but instead "allow a vote for the presidential candidate . . . to be counted as a vote for his party's nominees in the electoral college." *Id.* at 228. (Colorado is a state which follows the general rule

observed by the Court in *Blair*—potential presidential electors' names do not appear on the general election ballot.) The Supreme Court's reasons for upholding laws requiring electors to make pledges apply equally to laws requiring electors to fulfill those pledges. It would indeed be counterintuitive to hold that States (and political parties when delegated State authority) have power to require pledges but not to enforce them.

II. Application of *Ray v. Blair* is consistent with Supreme Court precedent emphasizing the breadth of States' constitutional power to appoint presidential electors.

The Supreme Court has emphasized the breadth of a State's constitutional power to "appoint" electors "in such manner as the Legislature thereof may direct" (U.S. Const. art. II, § 1, cl. 2). This power is "plenary", "comprehensive", and "exclusive". *McPherson v. Blacker* 146 U.S. 1, 25, 27, 36 (1892). States hold "the broadest power of determination." *Id.* at 27. The Colorado General Assembly's plenary, comprehensive, and exclusive power to decide the manner of appointing electors includes the power to enact the law at issue here. A law governing the circumstances under which the State appoints a replacement elector plainly addresses the "manner" in which electors are "appointed," thus falling within the heartland of the state legislature's constitutional authority.

More broadly (and as explained extensively in the Department of State's Response Brief), the Supreme Court has held that electors are *state* officials who act by *state* authority. Electors "are no more officers or agents of the United States than are the members of the state legislatures" (*In re Green*, 134 U.S. 377, 379 (1890)) and "are not federal officers or agents" (*Blair*, 343 U.S. at 224). Electors "act by authority of the state that it in turn receives its authority from the federal constitution." *Id.*

Since electors are state officials who act by state authority, States may require them to vote in accordance with state law. In "our federal system," States "retain autonomy" to control "their own governmental processes." *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015). Indeed, the power to control "those who exercise [state] authority" is a "fundamental" attribute of state sovereignty. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). These principles confirm that a state legislature may enact laws regulating how the State's electors exercise the State's authority to cast the State's electoral votes.

III. Application of *Ray v. Blair* is consistent with longstanding practice which confirms that States may bind presidential electors.

"[L]ong settled and established practice" deserve "great weight" in constitutional interpretation. *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2559 (2014); *see, e.g.*, *Blair*,

343 U.S. at 228 (emphasizing "longstanding practice"). Practice validates Colorado's authority to bind presidential electors.

The States. As stated in the Department of State's Response Brief, 29 state legislatures have enacted such laws. *See* Appellee's Answer Brief at 4-5. Moreover, some state courts have concluded as a matter of state common law that electors have a duty to fulfill their pledges. For example, in *Thomas v. Cohen*, 146 Misc. 836, 841–42 (N.Y. Sup. Ct. 1933), a New York court held that electors had a common-law "duty" to vote for their party's nominee, and that "[t]he elector who attempted to disregard that duty could . . . be required by mandamus to carry out the mandate of the voters of his state." The court rejected the notion that "presidential electors have a [constitutional] right to defy the will of the people." *Id.* at 846. Similarly, the Nebraska Supreme Court concluded in *State v. Wait*, 138 N.W. 159, 163 (Neb. 1912), that electors have a common-law "duty" to vote for their party's nominees, and that candidates for elector who "openly declare that they will not perform that duty" "vacat[e] their places as . . . presidential electors." Likewise, in *Spreckels v. Graham*, 228 P. 1040, 1045 (Cal. 1924), the California Supreme Court held that electors "have no duties to perform which involve the exercise of judgment or discretion in the slightest degree," but are instead "no more than messengers whose sole duty it is to certify and transmit the election returns." *Id.* The court added that the elector's duty to "represent the

preferences" of the people was (even by 1924) "so long established" that it constitutes "part of [California's] unwritten law." *Id.* Appellants' theory would require this Court to invalidate all of these statutes and state-court decisions.

Congress. Months after ratification of the Twenty-third Amendment—which authorizes the District of Columbia to vote in presidential elections—Congress enacted a statute providing: "Each person elected as elector [for the District of Columbia] shall . . . take an oath or solemnly affirm that he will vote for the candidates of the party he has been nominated to represent, *and it shall be his duty to vote in such manner in the electoral college*." Pub. L. 87-389; 75 Stat. 817, 819 (emphasis added). Plaintiffs' theory would require holding this Act of Congress unconstitutional.

The People. From the beginning of the Republic, electors have been chosen on the understanding that they will vote for a particular presidential candidate. Justice Story thus explained (3 Joseph Story, *Commentaries on the Constitution of the United States* § 1457 (1833)):

> [E]lectors are now chosen wholly with reference to particular candidates . . . The candidates for the presidency are selected and announced in each state long before the election; and an ardent canvass is maintained in the newspapers, in party meetings, and in the state legislatures, to secure votes for the favourite candidate, and to defeat his opponents. . . . [N]othing is left to the electors after their choice, but to register votes, which are already pledged; and an exercise of an independent judgment would be treated, as a political usurpation, dishonourable to the individual, and a fraud upon his constituents.

Presidential elections work much the same way today. Plaintiffs' theory would require this Court to replace a two-century-old system under which the vote of the People is decisive, and the vote of the electors is a formality, with a system under which the vote of the electors is decisive, and the vote of the People is a formality.

CONCLUSION

This Court should the District Court's dismissal order and confirm Colorado's right to require that its presidential electors honor the outcome of the popular vote of its residents when casting their ballots in the Electoral College.

Respectfully submitted this 29th day of August, 2018.

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CERTIFICATE OF SERVICE AND ECF CERTIFICATION

I hereby certify that on this 29th day of August, 2018, I electronically filed the foregoing **BRIEF OF AMICUS CURIAE COLORADO REPUBLICAN COMMITTEE** with the Clerk of the Tenth Circuit Court of Appeals using the CM/ECF system which will send notification of such filing to all counsel of record, and that:

- All required privacy redactions have been made;
- The hard copies to be submitted to the court are exact copies of the version submitted electronically; and
- The ECF submission was scanned for viruses with the most recent version of a commercial virus scanning program, and is free of viruses.

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